United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1370

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1370

UNITED STATES OF AMERICA,

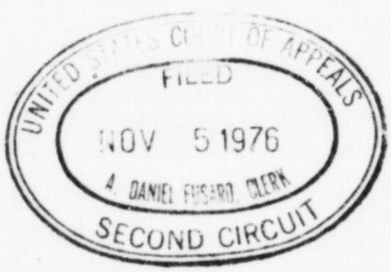
APPELLEE,

v.

DAVID LEE WHITE,

APPELLANT.

REPLY BRIEF FOR APPELLANT DAVID LEE WHITE



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REPLY BRIEF FOR APPELLANT

The appellant's escape conviction should be reversed because the trial judge refused to give a charge on evaluation of identification evidence, gave an insufficient charge on the coercion defense, and commented adversely on the defendant-appellant's credibility. The government's brief in some instances misapprehends the appellant's

arguments and in any case fails to undermine them. Accordingly, the judgment should be reversed.

ARGUMENT IN REPLY

A. The Failure To Charge On Identification

1. In arguing that the district court did not err in refusing to charge on identification, the government makes the astonishing statement that the "identification of White was simply never in issue." Gov't Br. at 10. To the contrary, the identification of the man in the store was deemed sufficiently important by the government at trial to justify bringing a private citizen witness to Connecticut from Kansas to testify in rebuttal of the coercion defense. After a Simmons hearing, witness Rita Gonzalez told of her prior photographic identification and made an in-court identification. The government must be suggesting that even if Ms. Gonzalez's identification was mistaken it was harmless error to send it to the jury without a pertinent instruction. This position cannot be sustained. The other evidence from which the government suggests the jury could have decided to reject the coercion defense consists only of inferences that might have been drawn from ambiguous facts (such as the appellant's failure to escape from Frey at a turnpike service station) or from his failure promptly to assert the coercion claim when he turned himself in. Gov't Br. 7, 10-11. The impact of Ms. Gonzalez's supposed eyewitness account was undoubtly more

impressive to the jury than the prosecutor's proposed hypothetical opportunities to return to custody, the very danger recognized in Simmons v. United States, 390 U.S. 377 (1968), and by Justice Stevens in U. S. ex rel. Kirby v. Sturges, 510 F.2d 397, 408 (7th Cir.), cert. denied, 95 S.Ct. 2424 (1975). It ill behooves the government to offer the evidence, over objection, in its rebuttal case and then claim on appeal it was so unimportant that no instruction was needed to assist the jury's evaluation of it.

2. The defendant made two separate requests to charge on identification. App. 37-38. The court's refusal to give either one in any form underlies the first argument in this appeal.*/ The government's suggestion that the appellant complains merely of a refusal to charge in the exact words requested, Gov't Br. at 12 n.11, is therefore inapt. As to appellant's alleged failure to object, the trial court chose to follow a different procedure by granting "an exception" in advance. App. 11. The error in the charge was not an inadvertent omission, but a considered refusal of the proper defense requests.

3. The government points out that the appellant's brief

*/ Cf. United States v. Robinson, No. 76-1177 (2d Cir., Oct. 29, 1976), slip op. 333, at 335 n.2.

does not directly challenge the trial court's admission of the eyewitness testimony. Gov't Br. at 10 n.10. The reason for this decision of counsel should be clear, however, for there has been no abandonment of appellant's position that the photographic spread was unnecessarily suggestive and the in-court identification had no independent basis. (The spread was shown two months after the sighting; appellent's photo was a different size from the others, and his was the only one of a man with glasses, which had figured in the eyewitness' original description.) Even if the identification evidence had been admissible, the trial judge should have given the Simmons-Fernandez charge so long endorsed by this Court to warn the jury against assigning the testimony undue weight. And if the evidence was actually inadmissible, as appellant maintains, the failure to caution the jury about its shortcomings was even more egregious.

B. The Court's Comments On The Defendant's Credibility

The appellant does not contend that the trial judge's two gratuitous, hostile and skeptical questions alone deprived him of a fair trial. The trial lasted less than

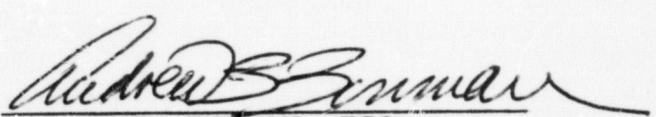
two days; the situations that arose in United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973), and United States v. Guglielmini, 384 F.2d 602 (2d Cir. 1967), could not have been duplicated here.[1/] Rather, the brief but improper exchange quoted at App. 8 and page 17 of the principal brief set the stage for prejudice when the court gave an unvarnished Reagan charge. Very recently, this Court condemned such a charge where it was not balanced by a parallel warning as to a prosecution witness whose credi-

1/ That is not to say, however, that the questions were proper under Fed. R. Evid. 614(b). They were not. As Judge Weinstein put it, quoting from the Advisory Committee Note to Proposed Supreme Court Evidence Rule 105 (marshalling the evidence): The judge "cannot convey to the jury his purely personal reaction to credibility . . .; he can be neither argumentative nor an advocate." 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶614[03], at 614-9 (1975). Compare United States v. Nathan, 536 F.2d 988, 993 (2d Cir. 1976), and the cases relied on by the government here, in all of which the court's instrusions were even-handed or served the legitimate purpose of clarification.

bility was also vitally at stake. United States v. Swiderski, 539 F.2d 854, 860 (2d Cir. 1976). The charge given here was less fair then that given in Swiderski or in United States v. Sullivan, 329 F.2d 755 (2d Cir.), cert. denied, 377 U.S. 1005 (1964) (Marshall, J.).

For these reasons and those stated in the principal brief, the conviction should be reversed and a new trial granted.

RESPECTFULLY SUBMITTED,



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DATED: Nov. 3, 1976

CERTIFICATION

This is to certify that two copies of the Appellant's Reply Brief were mailed to Hugh Cuthbertson, Esq., Assistant United States Attorney, Post Office Box 1824, New Haven, Connecticut, this 3 day of November, 1976.

Andrew B. Bowman
Federal Public Defender